

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2386 of 1984

with

SPECIAL CIVIL APPLICATION No 4094 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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ARVINDBHAI C PATEL

Versus

GUJARAT DAIRY DEVELOPMENT CORPN. LTD.

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Appearance:

1. Special Civil Application No. 2386 of 1984  
MR KETAN A DAVE for Petitioner  
MR KM PATEL for Respondent
2. Special Civil Application No 4094 of 1984  
MR KETAN A DAVE for Petitioner  
MR KM PATEL for Respondent

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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 15/08/97

#### C.A.V. JUDGEMENT

1. Both these Special Civil Applications have been filed by one and the same petitioner and against the one and the same respondent. These petitions have arisen in the matter of transfer and termination of services of the petitioner by the respondent, and as such, the same are being heard together and decided by this common order.

2. The petitioner was holding the post of Deputy General Manager (Production and Marketing) in the Corporation at the relevant time.

3. In the first petition, the petitioner is challenging the order dated 17th April, 1984, of the respondent under which the post of Deputy General Manager (Production and Marketing) has been abolished and the petitioner was transferred and posted as Deputy General Manager, Rajkot Dairy.

4. This Special Civil Application has come up for admission before this Court on 4th May, 1984, but interim relief was not granted. Under the order dated 1st August, 1984, the services of the petitioner were brought to an end. The petitioner filed an application for amendment in this Sp. C.A. but I do not find any order on file of this Sp. C.A. granting the said amendment. However, on 1st August, 1986, this Court has ordered, "In the mean time status quo as on today to be maintained" and this order was subsequently vacated on 16th August, 1984.

5. The petitioner filed second petition on 3rd August, 1984, challenging thereunder the order dated 1st August, 1984 terminating his services and on 8th August, 1984, the interim relief has been granted by this Court to maintain the status-quo. Then on 23rd August, 1984, the interim relief granted by this Court has been vacated.

6. The petitioner filed L.P.A. No.360/84 in Sp. C.A. No.4094/84 against the order of the single Judge vacating the interim relief. In L.P.A. No.360/84, the petitioner also filed C.A. No.3409/84. The L.P.A. was admitted on 6th September, 1984, and interim relief has been granted staying the implementation and operation of the impugned order dated 1st August, 1984 pending the disposal of the appeal. The aforesaid interim relief was directed to be given effect to forthwith. The counsel for the respondent therein prayed for time to implement the order, but that was declined.

7. The learned counsel for the petitioner challenging the order of transfer of the petitioner to Rajkot and abolition of post of Deputy General Manager (Production and Marketing) contended that the abolition of the post was malafide. Similarly, he further contended that the order of transfer was malafide as well as it was against the agreement. It has further been contended that as per the agreement in between the Municipal Corporation, Ahmedabad and the State Government, the service conditions of the existing dairy workers could not have been changed and earlier none of the employees of the dairy which was run by the Corporation were liable to be transferred, and as such, it is a case of change of service condition. Challenging the order of termination of the petitioner, the learned counsel for the petitioner contended that the order is arbitrary on the face of it. It has next been contended that the petitioner's services have been terminated on the ground of loss of confidence. Loss of confidence is a misconduct, and as such, without holding the inquiry the services of the petitioner could not have been terminated.

8. The learned counsel for the respondent, on the other hand, contended that the abolition of the post and creation of the post are in sole domain of the employer on which the employees have no say. The counsel for the respondent submitted that the post of Dy. Gen. Manager (Marketing and Production) has been bifurcated in two posts i.e. marketing and production for the convenience and in the interest of the Corporation and the petitioner cannot take any exception to this act of the Corporation. There is no question of malafide as alleged by the petitioner. However, the counsel for the respondent admitted that in reply to the Sp. C.A. it has been stated that the services of the petitioner has been terminated due to loss of confidence. The learned counsel for the respondent further submitted that even if the termination order is held to be invalid, looking to the facts of this case that the petitioner belongs to the golden category employee as well as the fact that despite of the grant of the stay by this Court of the order of the termination of his services, he has not joined the transferred place, the relief of reinstatement should not be granted as well as no compensation should be awarded in lieu of the reinstatement. So far as the challenge to the order of transfer is concerned, the learned counsel for the respondent submitted that the petitioner has failed to prove that the transfer is a service condition and either it is made malafide or against any statutory rules, and as such, the grievance made by the petitioner

is wholly untenable.

9. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties.

10. It is a settled law that creation and abolition of a post is prerogative of the employer. The decision of the employer to create or abolish the post may not be subject to judicial review by this Court unless it is a malafide action or where it is wholly perverse or arbitrary. The Corporation herein, the Gujarat Dairy Development Corporation Ltd., in case for its proper functioning and working it wants to create two separate posts of Deputy General Manager, (Marketing) and Dy. Gen. Manager (Production), how a grievance can be made by the petitioner. After going through the contents of the special civil application, I do not find any ground of malafide in the special civil application. Merely stating that the action is malafide is not sufficient to make out a case of malafide. The petitioner has failed to make out any case of malafide. It is a decision of the Corporation and not of individual persons. Where the decision has been taken by the Corporation how it can be said to be a malafide action. The petitioner has not specifically stated any allegations of malafide against any of the members of the Board of Directors of the Corporation as well as the Managing Director. Similarly, though the challenge to the transfer has been made by the petitioner on the ground of malafide, but after going through the contents of the special civil application, I do not find any pleadings which are sufficient to constitute a plea of malafide. Moreover, in the case where the petitioner has come up before this Court with challenge to the action of the respondent on the ground of malafides then the authority who passed the order and the party who has been favoured are the necessary parties. In the present case, the petitioner has not alleged any malafide against a particular officer of the Corporation nor of the Board of Directors and they have not been impleaded as a party. More so, the person who has been favoured is not made a party. In the case of J.N. Banavalikar vs. Mun. Corporation of Delhi reported in AIR 1996 SC 326, their Lordships of the Hon'ble Supreme Court held that where there are allegations of malafide then the authority who passed the order and the party who has been favoured are the necessary parties. In the present case, the petitioner has tried to give out that the post has been created at Ahmedabad for adjusting a particular person and petitioner has been shifted to Rajkot, but that person has not been impleaded as party. So, on merits as well

as on this ground of malafide, the challenge to the orders of transfer and that of termination of the services of the petitioner are not tenable.

11. Another ground of challenge to the transfer order is that it amounts to change of service condition. The transfer is not a service condition, but transfer is only an incident of service, and as such, this ground is not tenable. The order of transfer of an employee is subject to judicial scrutiny by this Court under Article 226 of the Constitution only on the ground that it is malafide or some statutory rules have been violated in making thereof by the authority. Reference in this respect may have to the decision of the Hon'ble Supreme Court in the case of Union of India vs. S.L. Abbas reported in JT 1993 (3) SC 678. The learned counsel for the petitioner is unable to show that the order of transfer of the petitioner was contrary to any statutory provisions. Then the counsel for the petitioner contended that the order of transfer has been made in violation of the agreement or the settlement, but he failed to produce any such agreement or settlement which prohibits the Corporation from transferring its officer from one place to another place.

12. The net result of the aforesaid discussion is that the Sp. C.A. No.2386/84 is devoid of any substance.

13. So far as the termination of the services of the petitioner is concerned, it is an admitted fact that the respondent has not given any notice or an opportunity of hearing to the petitioner. It is also not in dispute that the services of the petitioner were terminated on the ground of loss of confidence. Loss of confidence is a serious misconduct and it also casts a stigma, and as such, where the employer decides to terminate the services of an officer then the basic principles of natural justice have to be followed. The counsel for the respondent is not very seriously debating on this issue. However, the learned counsel for the respondent contended that the petitioner despite of the stay granted by the Division Bench of this Court in the matter of termination of the services, he has not joined the post, and as such, he is not entitled for any relief of reinstatement as well as awarding of compensation in lieu of reinstatement. The learned counsel for the respondent contended that the petitioner belonged to the golden category officer, and as such, when there is a case of loss of confidence, in such case the reinstatement should not be ordered. Further the learned counsel for the

respondent contended that the question of awarding of compensation to the petitioner also, as stated earlier, does not arise as he himself has not joined the post though the termination order has been stayed by this Court. The learned counsel for the petitioner admitted that during the pendency of the special civil application, the petitioner has already attained the age of superannuation, and as such, otherwise also the question of reinstatement of the petitioner does not arise. However, the learned counsel for the petitioner contended that when the order of termination is arbitrary then the petitioner should be awarded the compensation in lieu of reinstatement.

14. So the question with which we are concerned, is as to whether in the facts and circumstances of the case, the petitioner is entitled for any compensation in lieu of the reinstatement. The Division Bench of this Court stayed the operation of the order of termination of the services of the petitioner on 6th September, 1984. The petitioner under the order dated 17th April, 1984 was transferred to Rajkot and though the order of transfer has not been stayed, he has not joined the post at the transferred place for all these years. Even after the stay of the operation of the termination order, the petitioner has not joined the post at Rajkot. The learned counsel for the petitioner contended that the petitioner wanted to join the post, but the respondent has not allowed to join him the post. It is difficult to accept this contention. The petitioner has not produced any material on record to show and establish that at any point of time he has gone to the respondent office to join the post at Rajkot. When the stay order has been granted by this Court in favour of the petitioner and in case the respondents have not allowed him to join the post then the petitioner should have brought this fact to the notice of this Court, as noncompliance of the order of this Court is a contempt of Court and the petitioner has also not initiated any proceedings. So from this fact it is clearly comes out that the petitioner was not willing to join the post at Rajkot. The petitioner has taken it to be his prestige issue, and despite of the fact that the termination order has been stayed by the Division Bench of this Court, he has not joined the post at Rajkot.

15. In the rejoinder affidavit, the petitioner has stated that he made a detailed representation to the Managing Director of the respondent-Corporation on 20th October, 1989 for his continuance of service and withdrawal of the termination order. He further

approached the Managing Director from time to time. What the petitioner has stated that the Managing Director informed him that in view of the various legal proceedings and since the matter is sub-judice, he cannot take further action in the matter. He further assured him that he would seek necessary legal advise from the counsel and further action would be taken thereafter. So, whatever material is there it is only of the year 1989. The petitioner averred to have approached to the Managing Director, but even these averments are difficult to accept for the reasons, namely, (1) that the petitioner has not produced on record of this special civil application, the copy of the representation dated 20th October, 1989, (2) that the petitioner has also not produced any material on record that this material has been sent by him to the Corporation and the Corporation received the same, (3) that the petitioner has not produced any material on record to show that he has approached to the Managing Director from time to time. The petitioner has further not produced any evidence on record to show that the Managing Director has stated to him that because of various legal proceedings and since the matter is sub-judice, he cannot take any further action in the matter and further he assured the petitioner that he would seek necessary legal advise from the counsel and further actions would be taken thereafter. The pleadings made in the rejoinder affidavit are nothing but only the manufactured pleas. The worst part is that earlier to 20th October, 1989 and after 20th October, 1989, the petitioner has not produced anything on record. Much above that, as stated earlier, the petitioner has not approached this Court in case it would have been really a case where he would not have been allowed to join the post at Rajkot. So the petitioner himself did not wanted to serve the respondent No.1 and he has in fact not made any attempt to join the post.

16. The petitioner was holding the post of Deputy Gen. Manager, a very high post, and the conduct of the petitioner not to join at the transferred place after the order of transfer and when this Court declined to grant interim relief is another serious misconduct being a disobedience of the lawful order. This conduct of the petitioner has to be taken seriously while considering his case to grant him any relief. So the petitioner has disobeyed the order of transfer and he has not joined the post at the transferred place. Not only this, the order of termination has been stayed, but still the petitioner has not joined at the transferred place. In view of this fact, though the order of termination of the service of

the petitioner is illegal, but still the petitioner cannot be granted relief of reinstatement as well as the compensation in lieu of reinstatement. Otherwise also it is a fit case where principle of 'no work no pay' is attracted. The petitioner though had no hurdle in his way to work at Rajkot but still he has chosen not to join at Rajkot and now he claims the compensation which is wholly unjustified and dishonest claim. Much above that it is not the case of the petitioner that during all this period he was not in gainful employment elsewhere also.

17. In the result, both these Special Civil Applications fail and the same are dismissed. Rule discharged.

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